

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matters of	)	
	)	
Appropriate Framework for Broadband	)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities	)	
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Review of Regulatory Requirements for	)	CC Docket No. 01-337
Incumbent LEC Broadband	)	
Telecommunications Services	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of	)	
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards and Requirements	)	
	)	
Conditional Petition of the Verizon Telephone	)	WC Docket No. 04-242
Companies for Forbearance Under 47 U.S.C.	)	
§ 160(c) with Regard to Broadband Services	)	
Provided Via Fiber to the Premises; Petition of	)	
the Verizon Telephone Companies for	)	
Declaratory Ruling or, Alternatively, for	)	
Interim Waiver with Regard to Broadband	)	
Services Provided Via Fiber to the Premises	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271

**VERIZON'S<sup>1</sup> OPPOSITION**  
**TO THE ARIZONA CORPORATION COMMISSION'S**  
**PETITION FOR CLARIFICATION AND/OR RECONSIDERATION<sup>2</sup>**

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<sup>1</sup> The Verizon telephone companies ("Verizon") are the companies affiliated with Verizon Communications Inc. that are listed in Attachment A to these Comments.

<sup>2</sup> Petition of the Arizona Corporation Commission for Clarification and/or Reconsideration, CC Docket Nos. 02-33, 01-337, 95-20 and 98-10, WC Docket Nos. 04-242 and 05-271 (filed Nov. 16, 2005) ("*Petition*").

## **Introduction and Summary**

The Arizona Corporation Commission's ("ACC") petition for clarification and/or reconsideration of the Commission's recent *Title I Broadband Order*<sup>3</sup> should be denied. The petition asks the Commission to reconsider what it describes as two "narrow points" – (1) whether a wireline Internet access service becomes a Title II telecommunications service when a subscriber accesses a VoIP service over that connection and (2) whether a DSL transmission service, when sold to an ISP as an input for an Internet access service, should be regulated under Title II. But as merely reiterating those two points makes clear, the petition in reality asks the Commission to completely reverse course and reimpose the very rules that the Commission determined in the *Title I Broadband Order* act as regulatory roadblocks to the widespread deployment of competitive broadband services. The petition provides nothing beyond what already has been considered and rejected by the Commission to justify such an abrupt about-face, and should be denied. Instead, as Verizon points out in its own petition for limited reconsideration, the Commission should extend Title I relief to all broadband services by making it clear that those services may be provided on a private carriage basis, whether or not they are used for purposes of Internet access.

### **1. The Use of VoIP Does Not Affect the Proper Regulatory Classification of a Wireline Broadband Internet Access Service.**

The petition admits that the Commission's decision to classify wireline Internet access service as a Title I information service is "consistent with the *Brand X* decision," *Petition* at 3, but argues that such a service should lose its Title I status if a customer uses that service in

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<sup>3</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 ( 2005) ("*Title I Broadband Order*").

connection with a particular application – VoIP. That result is both legally untenable and also would contravene the Commission’s policy objectives.

As an initial matter, the petition expressly concedes that “[w]ith Internet access service, the consumer is receiving functions that meet the definition of an ‘information service.’”

*Petition* at 4. But it argues that this analysis is no longer valid if an end user decides to use a VoIP service over his or her broadband connection because “VoIP offers the end-user a transparent transmission path without any change in the form or content of the information.” *Id.* at 5. For several reasons, the ACC’s argument fails.

First, none of the aspects of the underlying Internet access service that qualify it as an information service in the first place are lost simply because an end user decides to use a VoIP service. Just because some of the bits being processed in this situation may ultimately facilitate voice communications, that does not transform the underlying Internet access service into a Title II telecommunications service. On the contrary, the result urged by the petition would be completely unworkable and would swallow the Title I relief that the Commission intended to grant. The petition argues that an Internet access service becomes a telecommunications service whenever it “is combined with VoIP or a telecommunications service.” *Petition* at 5. Thus, if a Verizon DSL customer were to use Vonage, or if an AT&T DSL customer were to use Verizon’s VoiceWing service, the petition argues that these DSL services would suddenly revert to Title II regulation. That result makes no sense. Moreover, it is impossible for the underlying Internet access provider to classify and treat its services differently based on the fact that an end user may, unbeknownst to the provider, be using the broadband Internet access service to access a VoIP service.

Second, at the very most, the petition's argument that the VoIP service itself provides a transparent transmission service without a change in form or content goes to whether the *VoIP* service is properly treated as a telecommunications service. But the Commission did not decide *that* issue in the order at issue here. And regardless of how it ultimately is resolved, that issue is a completely separate issue from, and does not bear on, the classification of the underlying Internet access service or the underlying broadband transmission service.

**2. All Stand-Alone Broadband Transmissions, Including DSL Transmissions, Should Be Subject to Title I Private Carriage Treatment.**

The petition also argues that the Commission erred by allowing providers the option of selling broadband transmission services to ISPs as a wholesale input for Internet access service under private carriage arrangements subject to Title I. *Petition* at 6-9. Again, however, that result is both legally untenable and would contravene the Commission's considered policy objectives. Instead, as explained more fully in our petition for limited reconsideration,<sup>4</sup> all broadband transmission services should be afforded the same regulatory treatment, and providers should have the option of selling these services on a private carriage basis regardless of whether they are used for Internet access.

The petition claims that the Commission lacks authority to permit a carrier to decide whether or not a particular service will be sold on a common or private carrier basis, stating that the common carrier status of a service is immutable and a service "[e]ither [] is a common carrier offering or it is not." *Petition* at 6-7. That is simply wrong. As the Supreme Court recognized in the *Brand X* decision: "The Commission has long held that 'all those who provide some form of transmission services are not necessarily common carriers.'" *NCTA v. Brand X Internet*

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<sup>4</sup> Verizon Petition for Limited Reconsideration of Title I Broadband Order, CC Dockets No. 02-33, 95-20 and 98-10 (filed Nov. 16, 2005).

*Servs.*, 125 S. Ct. 2688, 2706 (2005) (citation omitted). In fact, the Commission previously has found that the definition of telecommunications services “is intended to encompass only telecommunications provided on a common carrier basis” – that is, telecommunications offered not simply to the public, but “indifferently [to] all potential users.” *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 785 (1997). However, unless a provider chooses to offer services in that manner,<sup>5</sup> then precedent also recognizes that common carriage treatment cannot be imposed absent the presence of market power with respect to such services – something local telephone companies and other providers alike lack with respect to stand-alone broadband transmission services.

Consistent with this two-step approach, the Commission has made it clear that compelled Title II treatment is justified only to prevent an abuse of market power. Where competition restrains market power, the Commission can and must let market forces, rather than Title II regulations, guide the development of the marketplace.<sup>6</sup> In fact, where such competition is

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<sup>5</sup> The petition suggests in passing that “there is every indication that DSL providers hold themselves out to serve indifferently those who seek to avail themselves of their particular services, at both the wholesale and retail levels.” *Petition* at 8. But as the Commission recognized in its order here, telephone companies currently have no choice but to do so, given that they have been subjected to Title II by regulatory mandate. And both the Commission and the Supreme Court have recognized that previous regulatory compulsion is not a basis on which to require Title II treatment going forward in a competitive market.

<sup>6</sup> See *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, ¶ 9 (1998) *aff’d*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); see also, e.g., *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 1 FCC Rcd 561, ¶ 5 (1986) (finding no “compelling reason” to impose common carrier regulation on a carrier that had little or no market power); see generally Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* at 12 (OPP Working Paper No. 32, Sept. 2000) available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp32.doc](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.doc) (common carrier regulation “serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.”).

present, the Commission has often either mandated that services or facilities be taken outside of Title II completely, or (contrary to the petition's claim) allowed telecommunications providers to choose whether to offer service on a common- or non-common-carrier basis, particularly when those services are innovative or involve emerging technologies.<sup>7</sup> Therefore, the Commission was acting well within its authority in the *Title I Broadband Order* when it gave providers the choice whether to offer broadband transmission services that are an input for Internet access service on a common carrier or private carrier basis. See *Title I Broadband Order* ¶ 103.<sup>8</sup>

Other, well-established judicial precedent further confirms the Commission's authority to permit private carriage treatment where a provider lacks market power. As the D.C. Circuit confirmed when it upheld the Commission's decision to classify information services and CPE under Title I, "the latitude accorded the Commission by Congress in dealing with new communications technology includes the discretion to forbear from Title II regulation" by classifying services as non-common carriage under Title I. *CCIA*, 693 F.2d at 212. The court

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<sup>7</sup> See, e.g., *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 89 F.C.C.2d 58 (1982) ("*Cellular Systems*") (dispatch services may be offered either on a common or non-common carrier basis); *Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, 98 F.C.C.2d 792 (1984) ("*Subsidiary Communications Authorization*") (private carrier paging system may be offered either on a common or non-common carrier basis); see also *Computer & Communications Indus. Assoc. v. FCC*, 693 F.2d 198, 208-09 (D.C. Cir. 1982) ("*CCIA*") (affirming the reasonableness of the Commission's determination that enhanced services and customer premises equipment were outside the scope of Title II).

<sup>8</sup> The D.C. Circuit has followed the same approach, holding that common carrier regulation may only apply where a provider's market power justifies the imposition of such intrusive requirements, unless the provider itself chooses to operate as a common carrier. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use. In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [the service's] operations to expect an indifferent holding out to the eligible user public.").

explained that “the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances.” *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (citation omitted). Subsequently, the Commission has used this discretion to allow non-common-carrier provision of many types of innovative services as they have developed, including satellite services,<sup>9</sup> submarine cables,<sup>10</sup> for-profit microwave systems,<sup>11</sup> dark fiber,<sup>12</sup> and various mobile services,<sup>13</sup> to name just a few.<sup>14</sup>

The same private carriage approach is appropriate with respect to broadband transmission services sold as an input to Internet access services, as confirmed by the Commission’s decision in the *Cable Modem Declaratory Ruling*, and by the Supreme Court’s decision in *Brand X*. In the *Cable Modem Declaratory Ruling*,<sup>15</sup> the Commission decided that any “stand-alone transmission service” offered by cable companies to ISPs would be a “private carrier service and

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<sup>9</sup> *Licensing Under Title III of the Communications Act of 1934, as amended*, 8 FCC Rcd 1387 (1993) (allowing certain satellite services on a private carriage basis, including mobile voice, data, facsimile, and position location for both domestic and international subscribers); *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (1995) (allowing use of the Globalstar system for mobile voice, data, facsimile, and other services as a non-common carrier).

<sup>10</sup> *AT&T Submarine Systems, Inc.; FLAG Pacific Limited*, 15 FCC Rcd 22064 (2000).

<sup>11</sup> See, e.g., *General Telephone Company of the Southwest*, 3 FCC Rcd 6778 (1988) (providing that for-profit microwave systems may be offered as private carriage, even if interconnected with the public switched telephone network).

<sup>12</sup> *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

<sup>13</sup> *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 6 FCC Rcd 6601 (1991); *Cellular Systems* (dispatch services may be offered either on a common or non-common carrier basis); *Subsidiary Communications Authorization* (private carrier paging system may be offered either on a common or non-common carrier basis).

<sup>14</sup> A listing of further examples was included as Exhibit C to Verizon’s May, 3, 2002 Comments in this docket.

<sup>15</sup> *Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002).

not a common carrier service.” *Id.* ¶ 54. The Commission recognized that Title I treatment is appropriate where a provider deals with selected customers “on an individualized basis” rather than offering services “indiscriminately.” *Id.* ¶ 55. The Supreme Court’s decision in *Brand X Internet Servs.*, 125 S. Ct. at 2706.

Moreover, as we explained in our own petition, the Commission’s analysis in this regard is no less applicable when broadband transmission services are sold to other sophisticated enterprise customers for uses other than Internet access. No provider has market power with respect to any broadband transmission services, whether or not those services are used to access the Internet. And the absence of any such market power precludes compulsory common carrier treatment of these services. Moreover, the sophisticated customers who purchase broadband transmission services demand individualized solutions that are best handled through “individualized arrangements.” Thus, as Verizon demonstrated throughout this proceeding, the strong and increasing competition for broadband services compels the Commission to classify *all* broadband transmission under Title I, whether or not those transmission services happen to be used to access the Internet.



Therefore, the Commission should deny ACC's petition and instead should extend the same relief to all other stand-alone broadband transmission services.

Respectfully submitted,

A handwritten signature in cursive script, reading "William H. Johnson / ESH", positioned above a horizontal line.

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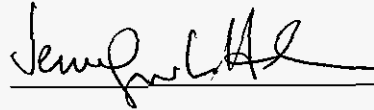
THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States  
GTE Southwest Incorporated d/b/a Verizon Southwest  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
Verizon Maryland Inc.  
Verizon New England Inc.  
Verizon New Jersey Inc.  
Verizon New York Inc.  
Verizon North Inc.  
Verizon Northwest Inc.  
Verizon Pennsylvania Inc.  
Verizon South Inc.  
Verizon Virginia Inc.  
Verizon Washington, DC Inc.  
Verizon West Coast Inc.  
Verizon West Virginia Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of December, 2005, copies of the foregoing  
"Opposition to the Arizona Corporation Commission's Petition for Clarification and/or  
Reconsideration" were sent by first class mail, postage prepaid, to the parties listed below.

A handwritten signature in black ink, appearing to read "Jennifer L. Hoh", is written over a horizontal line.

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